Editor's note: Appealed -- stipulated settlement, Civ.No. A4-84-215 (D.N.D. Oct. 24, 1985)

ELDIN L. R. JOHNSON
MARILYN JOHNSON

IBLA 80-77 (Supp.) Decided July 27, 1984

Appeal from a decision of the Montana State Office, Bureau of Land Management, dismissing a protest against oil and gas lease offer M-44226 (ND).

Recommended decision rejected; BLM decision affirmed.

1. Accretion -- Oil and Gas Leases: Lands Subject to -- Public Lands: Riparian Rights

   It is a general rule that a meander line is not a line of boundary but one designed to point out the sinuosity of the bank or shore and as a means of ascertaining the quantity of the land in the fractional lot, the boundary line being the waterline itself. The "Basart exception" to this rule is that if, at the time a homestead entry is made, a large body of land previously formed by accretion existed between the meander line and the waters of the stream, then the meander line will be treated as the boundary line of the grant, and the patent will be construed to convey only the lands within the meander line. In determining the applicability of the "Basart exception," consideration must also be given to equitable factors, including unjust enrichment.

APPEARANCES: Vern C. Neff, Esq., and Timothy L. Kingstad, Esq., Williston, North Dakota, for appellants; Richard K. Aldrich, Esq., Office of the Field Solicitor, Billings, Montana, for the Bureau of Land Management; David Provinse, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

In our decision of May 21, 1980, Eldin L. R. Johnson, 47 IBLA 366, the Board referred for a hearing the issue whether lands described by lease offer M 44226 (ND) had accreted prior to a homestead entry of adjacent lands and whether title to such accretions is in the United States. Lease offer M 44226 (ND) was submitted by David Provinse for 17.512 acres said to have accreted to lot 2, sec. 10, T. 150 N., R. 104 W., fifth principal meridian, McKenzie County, North Dakota. The time of formation of these lands was deemed critical by the Board because the Montana State Office, Bureau of Land

Management (BLM), had determined that these lands were formed prior to the date of entry, July 30, 1937, and consequently could be leased by the United States under the rule enunciated in Madison v. Basart, 59 I.D. 415 (1947). That rule states that a meander line will be treated as the boundary of a grant of riparian land if, at the time of entry, a large body of land previously formed by accretion existed between the meander line and the waters of the adjacent stream.

A protest against the issuance of lease M-44226 (ND) was filed by Eldin Johnson on September 24, 1979. This protest was dismissed by BLM on October 3, 1979, citing Madison v. Basart, supra, and holding that the lands accreted to lot 2 were not conveyed by a patent to Johnson's predecessor in interest. Eldin and Marilyn Johnson appealed the dismissal of the protest by a pleading filed on November 5, 1979, whereupon this Board ordered an evidentiary hearing. Eldin L. R. Johnson, supra.

A hearing was held on October 23, 1980, attended by representatives and witnesses of BLM and the Johnsons. A recommended decision of Administrative Law Judge John R. Rampton, Jr., was sent to this Board, BLM, and the Johnsons in June 1981. The decision recommended reversal of BLM's decision of October 3, 1979, and further recommended that Provinse's offer be rejected. Because the record did not show that Provinse was aware of BLM's decision of October 3, 1979, the Board's decision of May 21, 1980, the hearing held on October 23, 1980, or Judge Rampton's recommended decision of June 10, 1981, the Board sent to Provinse on July 18, 1983, a copy of each of the three decisions described above and requested that he inform the Board whether he intended to pursue lease offer M 44226 (ND). The Board also invited Provinse to submit with his answer whatever pleading or motion he might deem appropriate in response to the aforementioned decisions and hearing. On August 22, 1983, Provinse filed with the Board a pleading commenting on Judge Rampton's decision and affirming his continued interest in his offer. The pleading by Provinse offered no data beyond that which he had previously supplied to BLM in September 1979. Provinse did, however, point out that although he had not been named as an adverse party in the appeal by the Johnsons, the ultimate decision by this Board would affect BLM's handling of his lease offer M 44226 (ND).

In his recommended decision, Judge Rampton found the following facts to be without dispute:

> The property which is the subject of this appeal is an alleged accretion to lot 2 of section 10, T. 150 N., R. 104 W., 5th PM. Lot 2 is a part of Farm Unit "F" of the Lower Yellowstone Reclamation Project, which also contains the adjacent lot 1 of section 10 and lot 6 of section 3. The three lots are riparian to the Yellowstone River. On July 30, 1937, Jacob Weigum filed an entry on Farm Unit "F" and was issued [a] patent on November 20, 1942. (Exh. J) The patent, which was based upon a survey and plat completed on December 8, 1902, contained the following description of the property conveyed:
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> > Farm Unit "F", according to the Farm Unit Plat, or the Lot six of Section three and the Lots one and

> two of Section ten in Township one hundred fifty north of Range one Hundred four west of the Fifth Principal Meridian, North Dakota, containing seventynine acres and five hundreths of an acre, according to the Official Plat of the Survey of the said Land, on file in the General Land Office . . .
>
> Jacob Weigum [and Bertha M. Weigum] conveyed to Jerry A. Weigum and Bertha [M.] Weigum on August 28, 1966. (Exh. 0) Bertha [M.] Weigum conveyed her interest to Jerry A. Weigum and Carolyn Weigum on May 8, 1968. (Exh. P) The present owners of the property, Eldin L. R. and Marilyn Johnson, acquired the property from Jerry A. and Carolyn Weigum on November 24, 1972. (Exh. Q) All of the deeds in the chain of title contained the same description of the property as set forth in the patent.
>
> All of the owners of the property have used and claimed any accretions to the riparian lots described in the patent. Beginning in 1945, these lots were listed on the McKenzie County tax rolls as containing 116 acres. (Exhs. K, M, AA thru EE). Taxes on this amount of acreage had been paid by the appellant and his predecessors in title since 1945. (Tr. 51-53)

Recommended decision at 2.

Evidence as to the size of the accreted acreage was in conflict. The difference between the acreage granted in the patent and the total acreage listed in the tax rolls is approximately 37 acres, or an increase of 46.8 percent of the original patented lands. BLM, however, offered evidence of accretion in the amount of 44.65 acres, for a total percentage increase of 56 percent (Respondent's Exh. 1). With respect to lot 2 alone, BLM calculated an accretion of 21.25 acres, or 129 percent of the original lot. Id. These calculations were based upon an aerial photograph of the area taken on July 26, 1939 (Exh. 1; Tr. 140). No on-the-ground survey of the property was made on, or at any time near, the date of entry (Tr. 139). The Johnsons disputed BLM's calculations, pointing out that the aerial photograph shows a channel that flowed water at least part of the year, thereby reducing the acreage that could be regarded as accretion (Statement of Reasons at 24-34).

While acknowledging that BLM's estimates of accretion acreage were not without doubt, Judge Rampton found that these estimates, if taken as accurate, did not support BLM's use of the "Basart exception" to the general rule regarding riparian boundaries. This general rule and its rationale is succinctly set forth in Smith v. United States, 593 F.2d 982 (10th Cir. 1979).

> It has long been recognized that where the government has conveyed land by reference to a plat, and one of the boundaries is the meanderings of a river or other body of water, accretions which occur after the entry by the conveyee accrue to the benefit of the landowner. Jones v. Johnston, 59 U.S. (18 How.) 150, 15 L.Ed. 320 (1856); Jefferis v. East Omaha Land Co., 134 U.S. 178, 10 S.Ct. 518, 33 L.Ed. 872 (1890); Hughes v. Washington, 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967). The rationale

> for this rule is that if land bounds upon a river (or other body of water) it is subject to loss by erosion, and hence should be entitled to the gain which accrues by accretion. Also, access to water is often the most valuable feature of the property and what was water frontage property when received should continue to have that benefit. Further, a different rule would subject the landowner to continuous harassing litigation challenging the location of the original water line. Id. at 293-94, 88 S.Ct. 438. [Emphasis supplied.]

Thus, the general rule does not regard the meander line set forth on a plat of survey as the boundary to a riparian landowner's holdings in the event of accretion.

As noted above, the "Basart exception" to the general rule regards the meander line as the boundary of a parcel if large accretions have formed prior to entry:

> It is a general rule that a meander line is not a line of boundary but one designed to point out the sinuosity of the bank or shore and as a means of ascertaining the quantity of the land in the fractional lot, the boundary line being the water line itself. But there are a number of exceptions to this general rule. Thus, if the meander line was run where no lake or stream calling for it exists, or where it is established so far from the actual shore as to indicate fraud or mistake, the meander line is held to be the true boundary line. Another well-established exception is that if, at the time a homestead entry is made, a large body of land previously formed by accretion existed between the meander line and the waters of the stream, then the meander line will be treated as the boundary line of the grant, and the patent will be construed to convey only the lands within the meander line. [Footnotes omitted; emphasis added.]

59 I.D. at 421. At the hearing, BLM construed a "large" accretion to be one whose acreage amounted to 50 percent or more of the acreage described by patent (Tr. 107). This figure was derived from a Departmental decision, Burt Wackerli, 73 I.D. 280 (1966), involving omitted lands. On judicial review of the Wackerli case, the Department's application of the omitted lands exception was reversed. Wackerli v. Morton, 390 F. Supp. 962 (D. Idaho 1975).

We do not agree with Judge Rampton that the "Basart exception" is not applicable to the instant facts.

The so-called "Basart exception" to the usual boundary rule in such cases did not originate in the Departmental opinion styled Madison v. Basart, 59 I.D. 415 (1947). Rather, that decision merely reiterated the holdings in a long line of Federal court decisions. See cases collected at n.14, 59 I.D. at 422. These cases, and those decided since the Basart case, have provided the criteria for the application of the particular exception with which we are concerned here. Concisely stated, these criteria are:

1. The accretion must have formed prior to homestead entry or other private acquisition.

2. The amount of the accreted land must be perceived to be "large" or "substantial," or "an acreage largely in excess of what the patent calls for."

3. Whether the equities of the situation favored or disfavored the entryman, including whether he knew at the time that he was occupying a considerably larger acreage than he had contracted to enter and pay for, and whether he was unjustly enriched thereby.

There is no doubt that a sizable accretion of land had formed against the subject tract (Farm Unit "F") prior to its entry by Jacob Weigum in 1937, and his purchase of it from the United States in 1942. Whether that accretion amounted to 37 acres or 44.65 acres is disputed but, in our opinion, not controlling.

Farm Unit "F" (so designated by the Bureau of Reclamation during the organization of the Lower Yellowstone Reclamation Project) was comprised of surveyed lots 1 and 2 in sec. 10, and lot 6, sec. 3, aggregating 79.05 acres. An additional 37 acres (or 44.65 acres) must be regarded as "substantial" or as "an acreage largely in excess of what the patent calls for."

> If it should appear that at the time the homestead entry was made, a large body of land formed by accretion, existed between the meander line and the waters of the stream, and where to extend the lines of the entry and the lands conveyed by the patent to the waters of the stream would give the entryman an acreage largely in excess of what the patent calls for, while to limit the entry to the meander line will give the entryman all the acreage his patent calls for, and all that he paid for, then the court will construe the patent to mean that the meander line was intended to be the boundary line. Lammers v. Nissen, 154 U.S. 650, 14 S.Ct. 1189, 25 L.Ed. 562; Gleason v. White, 199 U.S. 54, 25 S.Ct. 782, 50 L.Ed. 87; Horne v. Smith, 159 U.S. 40, 15 S.Ct. 988, 40 L.Ed. 68.

United States v. Eldredge, 33 F. Supp. 337, 340 (D. Mont. 1940).

As held in DeBoer v. United States, 653 F.2d 1313 (9th Cir. 1981), the substantial accretion exception must not be applied solely on the basis of mere quantitative analysis. Thus, whether the excess was 46.8 percent of the land described by the patent, or 56 percent, is not determinative, regardless of how other tribunals have resolved other cases involving different, but comparable, percentages. Were it otherwise, we might foresee the day, after enough such cases had been decided, when the application of the exception would turn on a single, magic, percentile which would serve as an official "break point." Certainly, that sort of arbitrary resolution of litigation should be avoided, and BLM's reliance on a "50 per cent" criterion to the exclusion of other considerations was error.

Clearly, when Jacob Weigum purchased three specific surveyed lots comprising precisely "seventy-nine acres and five hundreths of an acre," and then proceeded to occupy and improve at least another 37 acres, the excess was a "substantial" acreage.

Moreover, it taxes credulity to assert that Jacob Weigum did not know that he was occupying and improving "acreage largely in excess of what the patent called for," or what Farm Unit "F" was supposed to consist of. The evidence indicates that Weigum was a farmer and raised livestock. An extra 37 acres or more added to a tract of 79 acres could hardly have escaped his notice. Moreover, he proceeded to fence the property to the waterline, a process that necessarily involved actual measurement of the land for the spacing and number of fence posts and the purchase of the required lengths of wire. He irrigated some of the land and devoted the balance to pasture. It would be a poor farmer who did not know with reasonable certainty how many acres he was utilizing for these purposes. Even the tax assessor must immediately have recognized that, despite the patent recitation, there was considerably more land there. The patent issued in 1942 and the occupants have been paying taxes on 116 acres since 1945, when Farm Unit "F" first went on the tax rolls because the patent had not previously been recorded. The conclusion is inescapable that Jacob Weigum knew that he was taking substantially more land than the 79 acres embraced in the three surveyed lots which he purchased, and chose to remain silent and exploit his good fortune. This is the essence of "unjust enrichment."

Generations of law students are familiar with a bit of doggerel, learned in the course on Real Property, which declares, "The law abhors strips and gores." Accretions prior to conveyance would be a prolific producer of strips and gores if the subsequent grantee were limited to that which was described by an earlier survey or in his deed of conveyance, while his grantor retained his title to the accreted land beyond. Probably this consideration has had its influence on the general rule which favors the grantee in such cases, even where the grantor is the sovereign. As a general rule, even a patent for governmental land whose boundary is described by a meander line conveys strips or tongues of land which project into the water beyond the meander line. United States v. Lane, 260 U.S. 662 (1922).

But where, as in this case, prior to conveyance, one might stand at one point on the meander line of the surveyed lot and look across 875 feet of additional land lying between that point and the water course, the excess cannot be regarded as a strip, gore, or tongue of land, but must be treated as "substantial" in proportion to the size of the tract conveyed. The surveyed lot is no longer riparian, rather, it is the Federally-owned accreted lands which now are subject to the risk of erosion or the benefit of further accretion.

Moreover, contrary to the rule of interpretation which governs private conveyances, the rule is well established "that land grants are construed favorably to the Government, not against it, that nothing passes except what is conveyed in clear language, and that if there are doubts, they are resolved for the Government, not against it." Watt v. Western Nuclear, Inc., 103 S. Ct. 2218, 2231, U.S. (1983); United States v. Union Pacific, 353 U.S. 112, 116 (1956); Caldwell v. United States, 250 U.S. 14, 20-21 (1918); Wisconsin Central R.R. Co. v. United States, 164 U.S. 190, 202 (1896).

In summation, it appears that the accretion formed against the surveyed lots prior to their conveyance, and thus was land owned by the United States at the time of conveyance of those lots; that such accretion was "substantial"

or "acreage largely in excess of whatthe patent called for;" that the grantee knew, or should have known, that he had taken and occupied land substantially in excess of what he had purchased and paid for; and that he was unjustly enriched thereby. We conclude, therefore, that the criteria for the operation of the "Basart exception" are met, and the accreted land is owned by the United States.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the recommended decision of the Administrative Law Judge is rejected and the decision of the Montana State Office, BLM, is affirmed.

Edward W. Stuebing
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge.

ADMINISTRATIVE JUDGE ARNESS DISSENTING:

In this case the trier of fact correctly found, based upon the evidence of record, that the Basart exception should not be applied. In considering the facts established by the evidentiary hearing held here it must be kept in mind that this appeal began as a protest by appellants against issuance of an oil lease to David A. Provinse. Provinse contended the land which is the subject of the appeal was federally owned, based upon studies he had made of aerial photographs of the river in the vicinity of the Johnson farm. The Johnsons claimed they owned the land, which they had purchased.

On appeal of the dismissal of the protest to this Board, an evidentiary hearing was ordered. The Board decision ordering the hearing required "if the question cannot satisfactorily be resolved that title is clearly shown to be in the United States, then BLM must properly reject the lease offer at issue." Eldon L. R. Johnson, 47 IBLA 368 (1980). The Administrative Law Judge interpreted this language to mean that "the burden is on the United States to establish 'clearly' that it has title" (Recommended Decision at 11). None of the parties has objected to this rule, either as stated by the Board prior to hearing, or as announced by the fact-finder. It was clearly the basis upon which the evidence was offered, received, and weighed.

> From this perspective, Judge Rampton analyzed the evidence as follows:
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> In [Madison v. Basart, supra] Madison, a land owner adjacent to the Missouri River, filed a protest against an allowance of Basart's homestead entry on the grounds that the lands described in the entry were owned by him by virtue of accretion to his land. The Missouri River, an active river, meandered extensively and, in many places, had moved more than a mile from its position as shown on the 1888 and 1899 plats of survey. Although the movement was rapid, there was no evidence, nor contention made, of avulsive change in the course of the river.
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> The land involved was lot 4, section 19, which was homesteaded by Madison's father on May 14, 1927. The field investigations made by the Land Office showed that, both at the time of entry and at the time of patent, lot 4, section 19, was more than a half a mile away from the banks of the Missouri River. The question presented was whether Madison, under the patent issued in 1933 for "lot 4," containing 34.98 acres, could validly claim the substantial accretion to that tract which had formed prior to May 14, 1927.

(Recommended Decision at 3-4).

After setting forth the general rule and the Basart exception thereto, Judge Rampton quoted the following passage from 59 I.D. at 422-23:

> This latter exception * * * is the present rule of the Department. Furthermore, the principle embodied in this exception has a number of advantages to commend it. The patentee does not acquire, at

> the time the patent is issued, a tract of land which is substantially in excess of the amount for which he has paid; certainly it is not reasonable that an entryman who received a patent for a tract of "34.98 acres" and who knew of its location in relation to the river, should now be permitted to claim that his patent awarded to him three and a half to four times the amount of the land thus specified. * * * Moreover, the rule as to the ownership of accreted land is said to have had its foundation in the desire of the courts to compensate riparian owners for the threat, often realized, that their lands may as well diminish as increase by reason of the water's action. It was thought to be equitable that the person who stands to lose by erosion of his land should have the opportunity to gain by accretion. But when a person in Madison's position, whose lot was approximately a half a mile from the river at the time he made his entry, seeks the benefits without incurring the risk of the disadvantages of the rule, such a claim affronts the reason for the rule's existence. He is not deprived of what he is entitled to receive -- lot 4, containing 34.98 acres. [Emphasis supplied.]

The distinction between the facts in this case and those in Basart are identified by Judge Rampton at pages 6-7 of his recommended decision:

> In the present appeal, there is no evidence to indicate that Jacob Weigum knew that the meander line to lot 2 of section 10 was at all set back from the Yellowstone River at the time of his entry and patent. The land was fenced to the river by him, and this use of the property has continued to the present day with Eldin Johnson using the land and improving it, with no knowledge of any adverse claim by the United States to his ownership. Taxes have been paid on a total of 116 acres since 1945. The appellant has been diverting water under permit for irrigation purposes from the Yellowstone River on the lands accreted to lot 2. (Exh. N) The river has moved very slowly away from lot 2 from 1965 through 1972, but the river has cut into lot 1. (Tr. 26-7, 29, 32, 36, 41-3).
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> The Department in Madison placed emphasis on the fact that at the time of entry and patent the border of lot 4 was over a half a mile away from the riverbank. In the case at issue, the appellants are unwilling to accept the BLM's interpretation of the placement of the [mean] high-water mark on the 1939 aerial photograph. However, even assuming that the riverbank was in the same position two years earlier at the time of entry, the border of lot 2 in section 10 is no more than 875 feet from the river at the widest point of accretion on the southern edge. Accretion narrows to a width of about 460 feet at the northern end of lot 2. Thus, even if one accepts as reliable the distance platted by BLM from the river to lot 2, the river in Madison was three to six times further distant from the entry.

Judge Rampton's discussion of the acreages to be used in determining the ratio of accreted land to patented lands is significant. At the hearing

and in a posthearing brief BLM states that the accretion attached to lot 2 amounts to 129 percent of the patented acreage of lot 2. Judge Rampton observes, however:

> When a single lot is plucked out of the patent and analyzed in isolation from the other two lots in the patent, a situation could be created whereby, on an active river such as the Yellowstone, one tract could have accretions built up while the bordering tract could be eroded. Thus, the BLM would claim that Weigum would not be entitled to the accretions to lot 2, but would be penalized for the erosions to the other two lots. This method of applying the proposed exception by individual lot would deprive the patentee of gains by accretion while leaving him with the loss of erosion. If Madison can be construed to apply to the present situation, it should be applied to all of the lands granted by a single patent, and in this case, by the BLM's own calculations, the total area of accretion to the three riparian lots is 44.65 acres, or [56] percentage increase of the acreage stated in the patent.

(Recommended Decision at 7).

With the exception of a North Dakota case, United States v. 11,932.32 Acres of Land, 116 F. Supp. 671 (D. N.D. 1953), the case law recognizes the Basart exception. Thus in Smith v. United States, 593 F.2d 982 (10th Cir. 1979), the exception was applied to vest title in the United States to 147.12 acres of land that had accreted to patented lands of 37.08 acres. The ratio of accreted acreage to patented acreage was slightly less than 400 percent.

Prior to Smith, Wittmayer v. United States, 118 F.2d 808 (9th Cir. 1941), recognized the Basart exception. Therein, an accretion of 90.84 acres was held to belong to the United States and the State of Montana. This accretion had formed adjacent to patented acreage of 68.36 acres, an increase of 133 percent.

A recent case, DeBoer v. United States, 653 F.2d 1313 (9th Cir. 1981), cautions, however, that a decision to apply the Basart exception must not rest wholly on a comparison of accreted acreage to patented acreage. In that case, the district court held that the Basart exception was applicable to vest title in the United States to 105.22 acres of accreted lands. This acreage was attached to lands described by patent as containing 165.05 acres. Thus, the ratio of accreted lands to patented lands was 64 percent. On appeal, the Ninth Circuit held that the question of whether an accretion is "quantitatively considerable" was but a threshold question:

> Having resolved that threshold question, however, the court should go on to weigh the equity factors in favor of both parties and determine whether the landowner would be unjustly enriched if he were given title to the accreted land. This is the approach implicitly taken by this Court in Wittmayer and more fully articulated by the Tenth Circuit in Smith v. United States, 593 F.2d at 986-88.

> In Wittmayer, the Court dealt with a fairly sizable accretion, but the decision rested to a large degree upon the Court's recognition that it would have been inequitable to allow Wittmayer to receive the benefit of accretion in the particular circumstances of the case. He knew, at the time of his entry, that land had accreted to the west of the meander line and he had in fact told others that, although he had entered upon 70 acres, almost twice as much land was on the part he had taken. 118 F.2d at 810-11.
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> Factors such as the landowner's knowledge of accretion at the time of entry and his lack of occupation of the accreted land bear on the justice of permitting public land to go to a private owner who paid for less than the total acreage claimed. Such factors were also considered in Mecca Land & Exploration Co. v. Schlecht, 4 F.2d 256 (D. Ariz. 1925), a case relied upon by the Wittmayer Court in articulating the substantial accretion exception. In Mecca Land, the court noted that upon entry, the homesteaders had actual notice that a large tract of land was lying west of the meander line, and they never occupied or asserted any right of possession to it. In addition, they had silently watched the government make substantial improvements on the land prior to asserting their claim for equitable relief. Id. at 260.
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> The Tenth Circuit has recently followed Wittmayer and refused to follow United States v. 11,932.32 Acres of Land, 116 F. Supp. 671 (D.N.D. 1953), which rejected the substantial accretion exception in its entirety. Smith v. United States, 593 F.2d 982 (10th Cir. 1979). In Smith, the court articulated the test to be applied as whether accretion is so substantial that it rises to the level of "unjust enrichment." Id. at 988. Factors relied upon in concluding that accretion was substantial in that case were the reasonableness of the landowner's belief that he was receiving four times the amount of land he had bid for, the lack of importance of waterfront access to the parties in the bidding and purchase process, and the obvious fact that the government would have acted differently had it realized the error. Id.
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> These court cases illustrate, then, that the substantial accretion exception has not been applied solely on the basis of mere quantitative analysis, but also upon consideration of the particular equitable factors bearing on unjust enrichment. [Footnotes omitted.]

653 F.2d 1313, 1315-16.

There appears in BLM's decision of October 3, 1979, no consideration of the equitable factors described in DeBoer. For this reason alone, its decision of October 3, 1979, must be set aside. The recommended decision of Judge Rampton does, however, consider these factors, and correctly concludes the Basart exception does not apply to the facts of this case. Upon the record assembled by the Johnsons, Provinse, and BLM, there is no basis for

concluding that the accretion in the instant case is so substantial as to permit an unjust enrichment of the Johnsons.

Contrary to the facts in Smith, the record does show that the Weigums and Johnsons were interested in waterfront property. Indeed, Johnson holds a permit from the State of North Dakota to divert water from the Yellowstone River at a point described in Provinse's lease offer (Tr. 31). The Weigums and Johnsons have maintained fences down to the river and have run cattle and livestock within the boundaries of the fence (Tr. 27). Part of the lands were irrigated (Tr. 26).

In contrast to the facts in Wittmayer, there is no evidence that the entryman knew he had entered lands substantially larger than those described by this homestead application. Nor is there any evidence to show that Weigum knew that the meander line to lot 2 was at all set back from the Yellowstone River at the time of entry and patent, contrary to the situation in Madison v. Basart.

The recommended decision of Judge Rampton does not answer the question when the accretions at issue were formed. Nor is there an express finding as to size of the accretions at the time of entry. Assuming, as apparently did Judge Rampton, that accreted lands totaling 44.65 acres had formed prior to entry, a 56-percent increase, the facts of record do not support application of the Basart exception.

The majority opinion fails to correctly apply two factors which are essential to a correct decision: First, the circumstance is overlooked that the burden to prove the applicability of the Basart rule is this case was placed upon BLM; and, second, that current Federal interpretations of the Basart rule require a showing of unjust enrichment before the exception is applied.

Under the circumstances shown, where this matter was tried with the understanding that the risk of nonpersuasion was BLM's, it is unfair now to place that burden upon appellants. The majority does this, however, by speculating that Weigum, the patentee, learned, at the latest, when he fenced the land, that he had obtained substantially more than he bargained for. This simply begs the question. There was no testimony by Weigum at the hearing. His absence was not explained. Nor was there any proof concerning the actual value of the land, either at time of patent, purchase, or hearing. There is no definite showing of the actual extent of accretion in 1937, the time of entry, or 1942, the date of patent. The extent of Weigum's other holdings or the relation of the accreted land to his other land is not known, except to the extent it can be inferred from aerial photographs. Judge Rampton, based upon the record before him, concluded "there is no evidence to indicate that Jacob Weigum knew that the meander line to lot 2 of section 10 was at all set back from the Yellowstone River at the time of his entry and patent." This finding is correct: The majority conclusion to the contrary is based upon an assumption that the accretion was so substantial in relation to the extent of the patent that Weigum must have known there was much more land than he bargained for.

This assumption, however, is not enough, even if logically derived from the facts found. Assuming the accretion was significant in extent, there is

absolutely nothing here to show that a resulting unjust enrichment occurred. There is no evidence on this point whatever: Again, it is simply assumed to exist in the comparative relationship of the accreted land to the land in the patent. While denying that adherence to a "50 percent criterion" should be used in cases such as this, the majority applies that very rule. In the absence of some proof of circumstances tending to show unjust enrichment the fact-finder's recommendations should be accepted and the Provinse lease offer rejected.

Franklin D. Arness
Administrative Judge.